Filed 2/4/03 Sara R. v. Superior Court CA5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

SARA R.,

Petitioner,

v.

THE SUPERIOR COURT OF FRESNO COUNTY,

Respondent,

FRESNO COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES,

Real Party in Interest.

F041864

(Super. Ct. No. 02CEJ300075-1)

OPINION

THE COURT[*]

ORIGINAL PROCEEDING; petition for extraordinary writ. A. Dennis Caeton, Judge.

Sara R., in pro. per., for Petitioner.

No appearance for Respondent.

Phillip S. Cronin, County Counsel, and Howard K. Watkins, Deputy County Counsel, for Real Party in Interest.

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[*] Before Vartabedian, Acting P.J., Harris, J. and Cornell, J.

Petitioner Sara R., in pro. per., seeks extraordinary writ review (Welf. & Inst. Code,[1] § 366.26, subd. (*l*); Cal. Rules of Court, rule 39.1B) of respondent court's order that a section 366.26 hearing be held on March 12, 2003, as to her daughter M.B. She contends the court erred in terminating reunification services. We will affirm the judgment.

STATEMENT OF THE CASE AND FACTS

On March 2, 2002, petitioner was arrested for a probation violation after she failed to complete outpatient drug treatment. The Fresno County Department of Children and Family Services (department) took then three-month-old M.B. into protective custody and filed a dependency petition pursuant to section 300, subdivision (b) (failure to protect) and subdivision (g) (no provision for support). The court detained M.B., sustained the subdivision (b) allegation, and set the dispositional hearing for May 22, 2002. M.B. was placed in a risk adopt home.

In its dispositional report, the department chronicled petitioner's long history of alcohol and drug abuse, criminal activity and child neglect. Petitioner, in her early 30's at the time of the instant dependency proceedings, overdosed four or five times on drugs, required detoxification twice for drugs and received alcohol and drug treatment five times. She resumed using cocaine, her drug of choice, in 1999 and, according to her, had been on a "run" ever since. At one point, she was spending up to $4,000 a month on cocaine and using up to an ounce daily. She was charged with drug-related offenses in 1987, 1988, 1993, 2000 and 2001, prostitution in 1986 and 1990, and probation violations in 2001 and 2002. She reported suffering serious chronic depression and anxiety for

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[1] All statutory references are to the Welfare and Institutions Code unless otherwise indicated.

which she was treated in 1993, 2000 and 2001. She was prescribed medication for her condition, but declined to take it.

Petitioner also has three older children no longer in her custody; two daughters, 13-year-old C.R. and 12-year-old J.R. and a son, 10-year-old T.S. In January 1990, petitioner left C.R. unattended in a motel room while she prostituted. She was arrested and booked for soliciting an undercover police officer for sex. The juvenile court assumed dependency jurisdiction and ordered petitioner to undergo substance abuse treatment. Petitioner reunited with C.R. and, over the next several years, gave birth to J.R. and T.S. However, her drug abuse persisted. As a result, C.R. and J.R. were placed in legal guardianship and T.S. was placed with his biological father.

On April 18, 2002, petitioner was admitted for inpatient substance abuse treatment. On April 24, 2002, she began group sessions with Dr. Kathryn A. Cannon, Ph.D., designed for women recovering from substance abuse who suffer anxiety and/or depression. She also began parenting classes on May 9, 2002. Nonetheless, the department concluded her prognosis for reunification was poor. Accordingly, the department recommended the court deny petitioner reunification services pursuant to section 361.5, subdivision (b)(13) because of her extensive and chronic substance abuse and resistance to treatment during the three-year period prior to the filing of the instant petition.

The contested dispositional hearing was conducted on July 31, 2002. By the time of the hearing, petitioner had completed the inpatient portion of her drug treatment and was a month into the transitional phase. Based on positive feedback from Dr. Cannon and Dr. Allison Armstrong, Ph.D., M.B.'s therapist, the court ordered reunification services, requiring petitioner to participate in parenting classes, complete mental health and substance abuse evaluations and participate in recommended treatment and submit to random drug testing. The court also ordered reasonable, supervised visitation with departmental discretion to arrange unsupervised visitation. The court also set the six-

month review hearing for November 13, 2002. Petitioner did not appeal the court's dispositional order.

On August 27, 2002, caseworker Natalie Castro took M.B. to the drug treatment facility for her first unsupervised visit with petitioner. When they arrived, Ms. Castro learned that petitioner had left the program. Earlier that day, a male friend took petitioner to drug test at the probation office and then to his apartment where he offered her cocaine. Petitioner ingested the cocaine and began a four-day cocaine binge. On September 2, 2002, petitioner checked herself back into the drug treatment facility. On September 5, 2002, she tested positive for cocaine.

After petitioner's relapse, both Dr. Cannon and Dr. Armstrong wrote letters to Ms. Castro in support of further reunification for petitioner. Dr. Cannon explained petitioner had only begun to engage in individual therapy when she relapsed and that, during her first few sessions, she addressed emotionally charged issues that could have played a significant role in her relapse. Dr. Cannon also believed petitioner had inadequate resources with which to manage her distress. She believed it was premature to expect petitioner to have made therapeutic progress and that petitioner's decision to immediately resume treatment after her relapse demonstrated her strength and motivation to achieve stability. Dr. Armstrong met with petitioner after her relapse and found her significantly depressed throughout the entire session. She recommended continued conjoint therapy with petitioner and M.B., twice-weekly individual therapy for petitioner and consistent visitation.

On September 10, 2002, the department filed a section 388 petition requesting the court terminate reunification services because petitioner discontinued drug treatment. In a status review dated October 15, 2002, the department reiterated its recommendation the court terminate reunification services, concluding petitioner had not made substantial progress in her case plan. Although petitioner completed the inpatient phase of drug

treatment, she needed to complete nine months of aftercare. The department also reported M.B.'s caretaker was willing to adopt M.B. if petitioner failed to reunify.

The section 388 and the six-month review were contested and conducted on November 6 and 7, 2002. Petitioner testified she completed inpatient treatment and three weeks of aftercare and was then living in a clean and sober environment. She had eight more months of aftercare to complete, two months to satisfy her case plan followed by six months to satisfy a condition of probation. Dr. Armstrong testified she was not aware of the intensity of petitioner's depression before her relapse. She participated in six sessions with petitioner since her relapse and observed a positive change. Dr. Cannon testified she diagnosed petitioner as suffering major depressive disorder after her relapse. Consequently, she increased petitioner's therapy sessions to twice weekly and had already observed signs of progress. She found petitioner to be more insightful and more aware of events that might trigger a relapse. She believed her prognosis was "good" and estimated that petitioner would require another six months of therapy.

After presentation of the evidence, county counsel argued petitioner failed to substantially comply with her case plan. She was only several weeks into the transitional phase of her drug treatment, the same position she was in when she relapsed. Petitioner argued the court should continue services because petitioner made significant progress in her case plan and there was a substantial probability M.B. would be returned to her care within another six months.

The court found petitioner was provided reasonable services, but did not make substantial progress in her case plan. The court also found there was not a substantial probability M.B. would be returned to petitioner's custody within six months. The court terminated reunification services and granted the department's section 388 petition. This petition ensued.

DISCUSSION

I. The court properly terminated reunification services after six months.

At the six-month review hearing, the court may terminate reunification services and schedule a permanency planning hearing where the child, on the date of removal, was under the age of three years and the court further finds, by clear and convincing evidence, the parent failed to participate regularly in the court-ordered plan. (§ 366.21, subd. (e).) If, however, the court finds there is a substantial probability that such a child may be returned to her parent within six months or that reasonable services were not provided, the court must continue the case to the 12-month permanency hearing. (*Ibid*). We review a juvenile court's order terminating reunification services for substantial evidence. (*In re Shaundra L*. (1995) 33 Cal.App.4th 303, 316.)

Petitioner first argues the court erred in terminating reunification services at the six-month review hearing because she was not provided reasonable services. Real party in interest argues she waived her right to challenge the reasonableness of services by failing to appeal from the dispositional hearing. While we conclude petitioner's claim is not barred by the waiver doctrine, nonetheless, we find her claim lacks merit.

The reasonableness of reunification services is judged according to the circumstances of the particular case and assessed by its two components--content and implementation. (*In re Ronell A*. (1996) 44 Cal.App.4th 1352, 1362.) "[T]he record should show that the supervising agency identified the problems leading to the loss of custody, offered services designed to remedy those problems, maintained *reasonable* contact with the parents during the course of the service plan, and made *reasonable* efforts to assist the parents in areas where compliance proved difficult …." (*In re Riva M*. (1991) 235 Cal.App.3d 403, 414; italics original.)

If petitioner were complaining the case plan as ordered was unreasonable, we would concur she waived that issue by failing to appeal from the dispositional order. (*In re Julie M*. (1999) 69 Cal.App.4th 41, 47.) However, she does not challenge the case

plan requirements. Rather, she challenges the department's efforts to implement the plan. Specifically, she claims the caseworker failed to schedule a staffing meeting prior to her transfer from inpatient care in July 2002 to the transitional phase of her drug treatment program. She further claims the caseworker failed to refer her for drug testing in August 2002. Finally, she claims the caseworker never referred her for a parenting class and that it was only through her own efforts that she was able to attend. In sum, she argues the court's finding she was provided reasonable services, at least in terms of the department's efforts to facilitate services, is not supported by substantial evidence. The contention that a judgment is not supported by substantial evidence, however, is an exception to the general rule that points not urged in the trial court cannot be raised on appeal. (*In re Brian P*. (2002) 99 Cal.App.4th 616, 623.) Therefore, petitioner's claim is not waived for appellate review. Accordingly, we will address the merits of her claim she was not provided reasonable services.

We conclude substantial evidence supports the court's finding the services provided were reasonable. Petitioner's primary problem was her inability to maintain sobriety. The department facilitated her participation in inpatient drug treatment twice, as well as individual, group and conjoint therapy. Moreover, there is no evidence she was prejudiced by the departmental deficiencies she cites. She cannot claim the department's failure to staff her transfer from inpatient to transitional treatment delayed her rehabilitation. Petitioner can only blame herself for any delay in rehabilitation by her relapse which occurred within six weeks after she completed her first round of inpatient drug treatment. She does not explain how she was harmed by the department's failure to refer her for drug testing in August 2002 or for parenting classes. She completed parenting class on August 15, 2002, and she was not penalized for not testing when it was not required of her. The evidence reflects the department made reasonable efforts to facilitate petitioner's reunification and supports the court's reasonable services finding.

Petitioner also argues the court erred in finding there was not a substantial probability M.B. would be returned to her custody within another six months. We disagree.

In order to find a substantial probability the child will be returned to the physical custody of his or her parent within the extended period, the court must find, pursuant to section 366.21, subdivision (g)(1), the parent (A) maintained consistent and regular contact and visitation with the child; (B) made significant progress in resolving problems that led to the child's removal from the home and (C) demonstrated the capacity and ability both to complete the objectives of his or her treatment plan and to provide for the child's safety, protection, physical and emotional well-being, and special needs.

Petitioner claims she satisfied the statutory requirements to support a finding in her favor. She argues she visited M.B. regularly and was in compliance with her case plan at the time of the six-month review hearing. She completed inpatient drug treatment and one of three months of aftercare required by the department. She also cites her regular participation in individual and group therapy. She argues the court terminated reunification services because her remaining eight months of aftercare and six months of individual therapy would preclude her from completing services in another six months. However, the record does not support her contentions. The court's finding was clearly based on petitioner's history of relapse and the strong possibility of its recurrence. "I can't say that I have any reason to believe there's not going to be another relapse." Petitioner simply failed to demonstrate the ability to complete the objectives of her case plan, i.e., maintain sobriety. We conclude substantial evidence supports the court's finding there was not a substantial probability M.B. would be returned to petitioner's custody within another six months. We find no error.

II. Petitioner received effective assistance of counsel.

Petitioner references the court's recitation of her right to appeal the dispositional order at the July 31, 2002, hearing and argues she was not "given proper counsel to file

and prepare this appeal …." She also argues she had to file the instant writ petition in pro. per. because trial counsel did not make himself available to assist her. To the extent that she is making a claim for ineffective assistance of counsel, her claim fails.

A petitioner asserting ineffectiveness of counsel in juvenile dependency proceedings must prove both deficient performance based on an objective reasonable standard and prejudicial error. (*In re Kristin H*. (1996) 46 Cal.App.4th 1635, 1667-1668.) Counsel's performance is deficient if it " 'fell below an objective standard of reasonableness … under prevailing professional norms.' [Citations.]" (*People v. Ledesma* (1987) 43 Cal.3d 171, 216.) Moreover, appellant has suffered prejudice if, absent counsel's errors, there is a reasonable probability of a more favorable outcome. (*Id*. at p. 218.)

In this case, trial counsel was not deficient for not appealing the dispositional order nor was petitioner prejudiced by his failure to do so. Under the circumstances, petitioner was fortunate the court granted her reunification services and, as we have concluded, she was provided reasonable services. Moreover, we find no ineffective assistance in the fact petitioner filed her own notice of intent and petition for extraordinary writ. The burden is on the parent in a juvenile dependency case to pursue his or her appellate rights, not on the attorney. (*In re Cathina W*. (1998) 68 Cal.App.4th 716, 723.)

DISPOSITION

The petition for extraordinary writ is denied. This opinion is final forthwith as to this court.